

5-1-1995

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Recommended Citation

Richard Kahn, *Inverse Condemnation and the Highway Cases: Compensation for Abutting Landowners*, 22 B.C. Env'tl. Aff. L. Rev. 563 (1995), <http://lawdigitalcommons.bc.edu/ealr/vol22/iss3/4>

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INVERSE CONDEMNATION AND THE HIGHWAY CASES: COMPENSATION FOR ABUTTING LANDOWNERS

*Richard Kahn**

*Where are you going my beautiful friend?
Is this the road that we take till the end?
And if we break down, are we left behind?
Is this the highway of all mankind?¹*

I. HITTING THE ROAD: THE INTRODUCTION

You wake up one morning and walk across the floor of your home, rubbing your eyes which are swollen from another night of fitful, disrupted sleep. As you walk, you feel the vibrations in your home which often rattle your dishes and windows. You reach the window of your living room that faces your front yard and you lift up the blinds that had been drawn the night before in a futile attempt to keep out the glare of passing headlights. With the blinds up, you squint through the layer of oily dust which has collected on your windows. It is the summer, but the windows must stay shut or the dirt, smoke, fumes, and noise will completely fill your house. As you stare out over your front lawn your eyes focus on the "For Sale" sign which has stood there for months as a subtle reminder of what your property has become. Your kids no longer play in this yard because the flying debris and occasional careening automobile make the yard too dangerous. You cannot have barbecues out there because the noise, which at times drowns out conversation or the sound of the television inside the house, is completely unbearable outside.

* Production Editor, 1994–1995, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

¹ BIG AUDIO DYNAMITE II, *The Globe*, on THE GLOBE (Columbia 1991).

Your focus now shifts to the new six-lane superhighway which lays no more than 100 feet beyond your property line. It is this majestic roadway which has rendered your property unfit for residential use. The thousands of cars which pass your house every day enjoy the incredible convenience of this asphalt giant; you, however, have received only misery. As you shift your eyes to your left, you reflect on the irony in the fact that your neighbors, who had one-fifth of their front yard condemned during the highway construction as a right of way, received ample compensation for the collapse in the market value of their entire property resulting from the attendant deleterious effects of living next to a highway. Because you had no part of your property condemned for the highway construction, you have received nothing.²

The overwhelming majority of jurisdictions would fail to provide you—or any other similarly situated property owner—with a means of compensation for these damages.³ Conversely, virtually all courts would allow compensation if even the tiniest fraction of private property was condemned for a right of way for highway construction. These same courts would arbitrarily exclude from compensation property owners who merely abut the newly constructed highway.⁴

A few innovative jurisdictions, however, have begun to apply a theory of inverse condemnation that allows compensation for damages to highway abutters.⁵ This theory of inverse condemnation, elev-

² Although this story is fictional, the details were gleaned from a number of real situations. See, e.g., *Northcutt v. State Rd. Dep't*, 209 So. 2d 710 (Fla. Dist. Ct. App. 1968), *cert. dismissed*, 219 So. 2d 687 (Fla. 1969); *Reisenauer v. State, Dep't of Highways*, 813 P.2d 375 (Idaho Ct. App. 1991); *Adams v. Department of Highways*, 753 P.2d 846 (Mont. 1988); Tracie Cone, *Finally . . . Some Peace and Quiet! Is Noisy, Dusty, Construction-Mangled I-95 Making You Crazy? What If You Lived Next To It?*, MIAMI HERALD, Feb. 7, 1990, at D1; Stephen C. Fehr, *Along Noisy Interstate, a Hue and Cry for a Wall*, WASH. POST, Apr. 12, 1993, at D1; David Iams, *Living Alongside I-295 Is a Noisy Affair*, PHILA. INQUIRER, July 15, 1984, at C28.

³ See *infra* notes 54–74 and accompanying text.

⁴ See *infra* notes 33–52 and accompanying text. One commentator has observed that: [T]he cutting edge of the prevailing rules of proximity damages is not the logic of distance but the accident of location of the injury-producing activity upon land taken from the claimant. If no part of the claimant's land has been taken for the project, though it be immediately adjoining, he must suffer resulting proximity losses without recourse; but if a partial taking occurs, however slight, those losses are compensable as severance damages.

Arvo Van Alstyne, *Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California*, 16 U.C.L.A. L. REV. 491, 505 (1969); see David M. Setter, Note, *Highway Noise: To Compensate or Not To Compensate*, 30 DRAKE L. REV. 145, 158 (1980–81).

⁵ *Harding v. Department of Transp.*, 205 Cal. Rptr. 561, 566 (Cal. Dist. Ct. App. 1984); *Thomsen v. State*, 170 N.W.2d 575, 579 (Minn. 1969); *Knight v. City of Missoula*, 827 P.2d 1270, 1276 (Mont. 1992); *Knight v. City of Billings*, 642 P.2d 141, 145 (Mont. 1982); *Board of Educ. v. Palmer*, 212

erly termed "condemnation-by-nuisance" by one commentator,⁶ has been widely accepted in the context of property owners situated near airports.⁷

This Comment examines the current plight of highway abutters and explores the possibility of applying inverse condemnation as a means of supporting a claim for damages caused by a property owner's proximity to a newly constructed or widened highway. Section II explores the highway construction and condemnation scenario and reviews the limited options currently available to highway abutters.⁸ Section III reviews the "airport cases" and how some courts have applied a theory of inverse condemnation to support an award of damages to property owners near an airport whose property was not condemned and has not suffered a technical trespass.⁹ Section IV explores how the inverse condemnation analysis from the airport cases may be applied to highway cases. This section concludes with an argument that the condemnation-by-nuisance approach should be universally adopted to compensate landowners whose properties lie adjacent to highways.¹⁰

II. THE HIGHWAY PROBLEM: THE COURTS TAKING A WRONG TURN

Highways, as a key element of the American transportation system, have greatly influenced the social and economic organization of the country.¹¹ On a broad scale, highways facilitate travel and migration,¹² whereas the accessibility created by highways attracts investment and industrial development to local communities.¹³ Although specific communities benefit from the construction of a highway, individual landowners are subjected to the deleterious effects that highways bring to the vicinity: increased and disruptive noise levels,¹⁴ pollution

A.2d 564, 570-71 (N.J. Super. Ct. App. Div. 1965), *rev'd on other grounds*, 218 A.2d 153 (N.J. 1966); *Lambier v. City of Kennewick*, 783 P.2d 596, 599 (Wash. Ct. App. 1989), *review denied*, 791 P.2d 535 (Wash. 1990); *City of Yakima v. Dahlin*, 485 P.2d 628, 630-31 (Wash. Ct. App. 1971).

⁶ William B. Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. 207, 209 (1967).

⁷ See *infra* notes 109-43 and accompanying text.

⁸ See *infra* notes 11-75 and accompanying text.

⁹ See *infra* notes 76-143 and accompanying text.

¹⁰ See *infra* notes 144-204 and accompanying text.

¹¹ MARK H. ROSE, *INTERSTATE* at xiii (1990).

¹² *Id.*

¹³ U.S. DEP'T OF TRANSP., *SOCIAL AND ECONOMIC EFFECTS OF HIGHWAYS* 75-77 (1976).

¹⁴ See, e.g., *People v. Volunteers of Am.*, 98 Cal. Rptr. 423, 426 (Cal. Dist. Ct. App. 1971); *Knight v. City of Billings*, 642 P.2d 141, 143 (Mont. 1982); *City of Tulsa v. Mingo Sch. Dist. No. 16*, 559

from exhaust fumes and highway dust and debris,¹⁵ vibrations from continuous traffic,¹⁶ glaring lights from passing vehicles,¹⁷ and the accident potential from a high volume of rapidly moving trucks and automobiles.¹⁸ These negative effects are the focus of compensation awards in highway eminent domain proceedings.

Before a highway can be constructed, the government must first acquire property for rights-of-way on which to build the highway. This property is often acquired from private landowners.¹⁹ The government accomplishes this acquisition through the power of eminent domain.²⁰ In its simplest form, eminent domain refers to the power of a government to "compel its subject to give up property interests in land or things."²¹ The government can only invoke the power of eminent domain as part of a legitimate governmental function, such as for the public welfare.²² If the federal government takes private property²³ for a public use, then, pursuant to the "takings" clause of the Fifth Amendment to the United States Constitution, the government must compensate the private property owner for his or her loss.²⁴ Each state, with the exception of North Carolina, has a similar clause in its state constitution requiring compensation for the taking of

P.2d 487, 489 (Okla. Ct. App. 1976); *City of Yakima v. Dahlin*, 485 P.2d 628, 629-30 (Wash. Ct. App. 1971).

¹⁵ See *Harding v. Department of Transp.*, 205 Cal. Rptr. 561, 563 (Cal. Dist. Ct. App. 1984); *Knight v. City of Missoula*, 827 P.2d 1270, 1273 (Mont. 1992); *Adams v. Department of Highways*, 753 P.2d 846, 846-47 (Mont. 1988).

¹⁶ See *Northcutt v. State Rd. Dep't*, 209 So. 2d 710, 711 (Fla. Dist. Ct. App. 1968), *cert. dismissed*, 219 So. 2d 687 (Fla. 1969); *Jacobson v. Crown Zellerbach Corp.*, 539 P.2d 641, 642 (Or. 1979).

¹⁷ See *Richmond County v. Williams*, 137 S.E.2d 343, 344 (Ga. Ct. App. 1964); *City of Billings*, 642 P.2d at 143.

¹⁸ See *Reisenauer v. State*, 813 P.2d 375, 377 (Idaho Ct. App. 1991); *City of Billings*, 642 P.2d at 143; *State v. Board of Educ.*, 282 A.2d 71, 74 (N.J. Super. Ct. Law Div. 1971); *Lambier v. City of Kennewick*, 783 P.2d 596, 597 (Wash. Ct. App. 1989), *review denied*, 791 P.2d 535 (Wash. 1990).

¹⁹ See DANIEL S. GUY, *STATE HIGHWAY CONDEMNATION PROCEDURES* 9 (1971).

²⁰ See *id.* at 3-6.

²¹ WILLIAM B. STOEBOCK, *NONTRESPASSORY TAKINGS IN EMINENT DOMAIN* 4 (1977).

²² See *id.* at 20, 21.

²³ One court has defined the term "property" as, "comprehend[ing] not only the thing possessed, but also, in strict legal parlance, mean[ing] the rights of the owner in relation to land or a thing; the right of a person to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from the use." *Duffield v. DeKalb County*, 249 S.E.2d 235, 237 (Ga. 1978). One commentator echoed a similar explanation: "The term *property* has been successively broadened to include all types of interests in land, stretching beyond fee title to include leaseholds, future interests, materialman's liens, contracts—in other words, all rights to use, dispose of, and enjoy dominion over property." ELLEN FRANKEL PAUL, *PROPERTY RIGHTS AND EMINENT DOMAIN* 80 (1987) (emphasis in original).

²⁴ The Constitution states in relevant part: "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

private property for public use.²⁵ Furthermore, twenty-six states also include a provision that compensates individuals for property that is damaged by the government in the course of a governmental activity—such as in the construction of a public improvement—as well as for that which is taken for public use.²⁶

In the context of highway construction, a governmental highway agency frequently employs the power of eminent domain to acquire lands for rights-of-way on which a highway will be built.²⁷ The highway authority generally has the power to condemn whatever land is necessary for a construction project, whether the land be entire properties or merely portions of properties.²⁸ In a condemnation proceeding for the acquisition of property, the government must pay a condemnee the fair market value for the land condemned.²⁹ Additionally, virtually all jurisdictions recognize some form of constitutionally mandated compensation to a property owner for damages to the remainder of the property that a highway's presence creates when some part of the owner's property has been condemned for construction of a highway.³⁰ This measure of compensation exists in the form of "severance" or "consequential" damages which generally are described as the damages that are caused to the property remaining in the private landowner's possession following a partial condemnation.³¹ However,

²⁵ STOEUCK, *supra* note 21, at 5. Although North Carolina lacks an eminent domain or taking clause in its constitution, "the state's supreme court has enunciated the principles and has been most liberal in applying them." *Id.* at 6.

²⁶ *Id.* at 5; *see, e.g.*, ARK. CONST. of 1874, art. II, § 22; MO. CONST. of 1945, art. I, § 26; N.D. CONST. art. I, § 16; PA. CONST. art. I, § 10.

One commentator notes: "The 'damaging' language has the effect of more or less facilitating compensation for certain kinds of nontrepassory takings, though every act for which compensation has been allowed as a damaging has, in some jurisdictions, also been compensated as a taking." STOEUCK, *supra* note 6, at 5-6.

²⁷ GUY, *supra* note 19, at 21-22.

²⁸ *Id.*

²⁹ *Id.* at 5-6.

³⁰ *See, e.g.*, *People ex rel. Dep't of Pub. Works v. Symons*, 357 P.2d 451, 453 (Cal. 1961); *Knight v. City of Missoula*, 827 P.2d 1270, 1276 (Mont. 1992); *State v. Board of Educ.*, 282 A.2d 71, 76 (N.J. Super. Ct. Law Div. 1971); *South Carolina State Highway Dep't v. Touchberry*, 148 S.E.2d 747, 748-49 (S.C. 1966).

³¹ *See, e.g.*, *Symons*, 357 P.2d at 453; *City of Missoula*, 827 P.2d at 1276; *State v. Board of Educ.*, 282 A.2d at 76; *Touchberry*, 148 S.E.2d at 748-49. Although many courts frequently use the terms "severance" and "consequential" interchangeably to describe the compensable damages caused to the remainder or noncondemned property, some courts use "severance" to denote the compensable damages to the remainder and "consequential" to denote those damages that are generally not compensable. For the purposes of clarity and consistency, this Comment will only use the term "severance" to refer to the compensable damages to the remainder and will use the term "consequential" to refer generally to damages that are a consequence of the presence of the public use (highway), whether the damages are compensable or not.

the extent of compensation for these damages varies depending on the jurisdiction.³²

A. Salvation for the Condemned: Compensation for the Property Owner Whose Land Has Been Partially Condemned

Some courts allow for compensation for consequential damages from highways only in the most narrow contexts. These courts provide for recovery in circumstances where there has been a direct physical invasion caused by the construction of a highway that would be actionable under common law, such as a loss of the land's lateral support or a flooding of the property that the construction of a highway causes.³³ These courts reason that state constitutional provisions that require compensation anticipate an actual physical injury to the land and not "something which merely affects the senses of the persons who use the property."³⁴ On the other hand, some courts grant compensation for all damages that the proximity of the entire highway causes to the remainder.³⁵ In these jurisdictions, as long as the government has taken part of the original parcel of property, the court entitles the condemnees to recovery for the complete diminution of value that their property suffers as a consequence of abutting the new highway.³⁶ These courts reason that when assessing the impact of a public improvement on the remainder of a partially condemned parcel of private property, the parcel of land "should be considered as a whole."³⁷

Other courts only allow compensation for those damages attributable to the portion of the construction project located on the condemned piece of property.³⁸ Thus, if the government condemns a 100 square foot section of an individual's property for a highway right-of-way, the individual's severance damages will be limited to the damages caused by the section of highway that lays on the 100 square feet of land rather than the damages caused by the highway as an en-

³² See *State v. Carroll*, 587 A.2d 260, 268-69 (N.J. 1991) (citing numerous jurisdictions and their varying standards of compensation).

³³ See, e.g., *State v. Cook*, 542 P.2d 1405, 1406 (Okla. 1975); *State v. Williams*, 452 P.2d 881, 882-83 (Utah 1969).

³⁴ *Williams*, 452 P.2d at 883; see *Cook*, 542 P.2d at 1406.

³⁵ See, e.g., *State v. Bland*, 355 So. 2d 283, 285 (La. Ct. App. 1978); *Touchberry*, 148 S.E.2d at 748-49.

³⁶ See, e.g., *Bland*, 355 So. 2d at 285; *Touchberry*, 148 S.E.2d at 748-49.

³⁷ *Touchberry*, 148 S.E.2d at 749; see *Bland*, 355 So. 2d at 285.

³⁸ See, e.g., *People ex rel. Dep't of Pub. Works v. Symons*, 357 P.2d 451, 454 (Cal. 1961); *Mason v. Department of Transp.*, 283 S.E.2d 690, 690 (Ga. 1981); *State v. Board of Educ.*, 282 A.2d 71, 76 (N.J. Super. Ct. Law Div. 1971).

tirety.³⁹ These courts reason that because the property owners would not be able to recover compensation for damages to their properties from the entire highway in the absence of a partial taking, the property owners' compensation for the partial taking should be limited to the value of the land taken plus only those damages caused by the taking.⁴⁰ In calculating the exact amount of recovery, these courts typically allow consideration of damages from the entire highway where the damages caused by the portion located on the condemned property are inseparable from the damages caused by the whole highway.⁴¹ For example, in the hypothetical where 100 square feet of land is condemned, if the amount of damages caused by the noise and dust originating from the section of highway on the 100 square feet of land is indistinguishable from the damages caused by the dust and noise originating from the highway as a whole, then the latter damages may be considered in the calculation of the severance award.⁴² Courts draw a distinction, however, where the strip of condemned land is taken for a peripheral use, such as a fence, and not for actual highway.⁴³ In those circumstances compensation would be restricted to the limited amount of damages which were a consequence of the erection of the fence.⁴⁴

Other courts provide for compensation only where the damages to the remainder are "special or peculiar" to that piece of property.⁴⁵ These courts reason that an individual should not be able to recover compensation for effects suffered by the general public.⁴⁶ Damages from highway traffic which are common to the general public, such as noise or dust, are not compensable in these jurisdictions.⁴⁷ For example, a number of properties may be partially condemned for a highway construction project. Collectively, the landowners will not be able to

³⁹ See, e.g., *Symons*, 357 P.2d at 454; *Mason*, 283 S.E.2d at 690; *State v. Board of Educ.*, 282 A.2d at 76.

⁴⁰ See, e.g., *Symons*, 357 P.2d at 454; *Mason*, 283 S.E.2d at 690; *State v. Board of Educ.*, 282 A.2d at 76.

⁴¹ See *State v. Board of Educ.*, 282 A.2d at 77.

⁴² See *id.*

⁴³ *People ex rel. Dep't of Pub. Works v. Symons*, 357 P.2d 451, 455 (Cal. 1961).

⁴⁴ *Id.*

⁴⁵ *City of Lakewood v. DeRoos*, 631 P.2d 1140, 1142-43 (Colo. Ct. App. 1981); *Department of Transp. v. Reckamp*, 291 N.E.2d 868, 870 (Ill. App. Ct. 1973); *Mississippi State Highway Comm'n v. Colonial Inn, Inc.*, 149 So. 2d 851, 855 (Miss. 1963); *State v. Mertz*, 778 S.W.2d 366, 368 (Mo. Ct. App. 1989).

⁴⁶ *City of Lakewood*, 631 P.2d at 1142-43; *Reckamp*, 291 N.E.2d at 870; *Mertz*, 778 S.W.2d at 368.

⁴⁷ *City of Lakewood*, 631 P.2d at 1142-43; *Reckamp*, 291 N.E.2d at 870; *Mertz*, 778 S.W.2d at 368.

recover for general noise and pollution damages to their properties. However, a specific landowner whose property is situated such that the property suffers damages beyond that to which the neighboring properties are subjected may be able to recover for those extraordinary consequential damages.⁴⁸

Finally, some courts, in calculating a severance award, recognize consequential damages from highways as a factor to be considered in determining the decrease in market value to the remainder of a property rather than as a separate item of compensable damages.⁴⁹ In these jurisdictions, courts consider the effect that increased noise from traffic has on the market value of the remainder in calculating the recoverable diminution in the property's market value.⁵⁰ However, property owners cannot recover damages for the presence of the noise itself.⁵¹ This is because courts reason that, in calculating the diminution in market value of a parcel of land, a jury should consider all of the elements that a prospective purchaser of that land would consider.⁵²

B. The Dead End: Noncompensation for the Property Owner Whose Land Abuts a Highway but Has Not Been Condemned

Whereas an overwhelming majority of courts compensate partially condemned property owners for consequential damages in some form, most of these courts simultaneously deny compensation to the property owner whose property lies adjacent to a newly constructed or widened highway but has not been partially condemned.⁵³ In such

⁴⁸ See *Colonial Inn, Inc.*, 149 So. 2d at 855 (motel situated at intersection near newly constructed highway suffered from proximity of highway more so than other properties in area because motel was commercial business and thus was able to recover for consequential damages). Properties in the same vicinity may suffer different effects from a new highway depending on the local topography or the properties' exact distance from the roadway. See *infra* notes 178-83 and accompanying text.

⁴⁹ See, e.g., *State v. Garrick*, 256 So. 2d 111, 114 (La. 1971); *Dennison v. State*, 239 N.E.2d 708, 710 (N.Y. 1968); *City of Tulsa v. Mingo Sch. Dist. No. 16*, 559 P.2d 487, 491-92 (Okla. Ct. App. 1976); *City of Yakima v. Dahlin*, 485 P.2d 628, 630 (Wash. Ct. App. 1971).

⁵⁰ See, e.g., *Garrick*, 256 So. 2d at 114; *Dennison*, 239 N.E.2d at 710; *City of Tulsa*, 559 P.2d at 491-92; *City of Yakima*, 485 P.2d at 630.

⁵¹ See, e.g., *Garrick*, 256 So. 2d at 114; *Dennison*, 239 N.E.2d at 710; *City of Tulsa*, 559 P.2d at 491-92; *City of Yakima*, 485 P.2d at 630.

⁵² *City of Tulsa*, 559 P.2d at 491-92; see *Garrick*, 256 So. 2d at 114; *Dennison*, 239 N.E.2d at 710; *City of Yakima*, 485 P.2d at 630.

⁵³ See, e.g., *People ex rel. Dep't of Pub. Works v. Symons*, 357 P.2d 451, 455 (Cal. 1961); *Northcutt v. State Rd. Dep't*, 209 So. 2d 710, 712-13 (Fla. Dist. Ct. App. 1968), *cert. dismissed*, 219 So. 2d 687 (Fla. 1969); *Department of Transp. v. Bonnett*, 358 S.E.2d 245, 246 (Ga. 1987);

cases, however, the property owner theoretically could bring a cause of action in inverse condemnation.

Inverse condemnation refers to a cause of action against a government defendant to recover the value of property which has been taken in fact by the government, even though the government has not formally exercised the power of eminent domain.⁵⁴ Although these property owners may suffer the same deleterious effects from passing traffic as their neighbors who had strips of land actually condemned for highway construction, the property owners are denied compensation because they fail to meet the threshold eminent domain requirement of partial condemnation.⁵⁵

For example, in *Mississippi State Highway Commission v. Colonial Inn, Inc.*, the defendant motel owners had only .02 acres of their property condemned for the widening of a highway.⁵⁶ Nevertheless, because the motel owners satisfied the threshold requirement of at least some condemnation of their original property, the Supreme Court of Mississippi awarded the motel owners compensation for the damages caused to the remainder of their property by the noise and vibrations of the adjacent highway.⁵⁷ The court opined that the state constitutional guarantee of just compensation required that the motel owners receive compensation for the resulting diminution in value of their property.⁵⁸ If, however, the highway had been widened up to the motel's property line without requiring the condemnation of the .02 acre strip of land, the motel owners would not have been entitled to any compensation for the consequential damages.⁵⁹ Thus, where the

Adams v. Department of Highways, 753 P.2d 846, 850 (Mont. 1988); *Dennison v. State*, 239 N.E.2d 708, 710 (N.Y. 1968); *Harris County v. Felts*, 881 S.W.2d 866, 869-70 (Tex. Ct. App. 1994).

⁵⁴ *Thornburg v. Port of Portland*, 376 P.2d 100, 101 n.1 (Or. 1962); JULIUS L. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 8.01[4][a], at 8-30 (rev. 3d ed. 1994).

⁵⁵ See, e.g., *Symons*, 357 P.2d at 455; *Northcutt*, 209 So. 2d at 712-13; *Bonnett*, 358 S.E.2d at 246; *Adams*, 753 P.2d at 850; *Dennison*, 239 N.E.2d at 710; *Harris County*, 881 S.W.2d at 869-70.

⁵⁶ 149 So. 2d 851, 852-53 (Miss. 1963).

⁵⁷ *Id.* at 855; see *State v. Carroll*, 587 A.2d 260 (N.J. 1991) (holding defendant property owner entitled to compensation for noise damages to remaining property from adjacent highway where less than two-tenths of an acre of defendant's property had been condemned for highway project). But see *Commonwealth, Dep't of Highways v. Butler*, 438 S.W.2d 797 (Ky. Ct. App. 1969) (holding defendant property owner not entitled to compensation for noise damages where only four percent of defendant's property condemned for highway construction).

⁵⁸ *Colonial Inn*, 149 So. 2d at 855-56.

⁵⁹ See *id.*; see also *Harris County*, 881 S.W.2d at 867-70. In *Harris County v. Felts*, the County planned to condemn one square foot of the Felts' property as a right of way for the construction of a four lane major thoroughfare. 881 S.W.2d at 867. Following an appraisal of prospective damages to the Felts' property due to the property's proximity to the highway, the County decided not to condemn the small portion of the Felts' land in order to avoid expending funds. *Id.* at 868. Rather than rerouting the highway altogether, the County constructed the highway

government has not physically appropriated property, a traditional application of inverse condemnation theory, premised on a showing of an actual physical taking, results in no compensation for an abutting landowner.⁶⁰

Without a means for recovery under the commonly-applied condemnation theories, the noncondemned landowner normally could find recourse through a common law action in private nuisance.⁶¹ However, even assuming a landowner could make out the requisite showing of a substantial unreasonable interference with the landowner's property use caused by the defendant's intentional use of its land, the nuisance claim would be of limited efficacy because virtually all local, state, and federal governments claim a constitutionally or statutorily recognized immunity from nuisance claims as long as the government project has been legally authorized.⁶² To the extent that the construction and maintenance of roads is universally regarded as a legitimate governmental operation, a noncondemned landowner has no recourse under common law nuisance against the government.⁶³

Furthermore, property owners cannot try to hold individual non-governmental users of highways liable for nuisance damages because this would place "an intolerable burden upon public transportation, travel and commerce."⁶⁴ Because the government is responsible for constructing and maintaining a public use, it is the party that is ultimately liable to individual property owners for the harm that the

next to the Felts' property. *Id.* The Texas Court of Appeals for the 14th District held that the Felts could not recover for the damages caused to their property as a result of the property's proximity to a major highway because there had been no physical appropriation of land. *Id.* at 869-70.

⁶⁰ See, e.g., *Symons*, 357 P.2d at 455; *Northcutt*, 209 So. 2d at 712-13; *Bonnett*, 358 S.E.2d at 246; *Adams*, 753 P.2d at 850; *Dennison*, 239 N.E.2d at 710.

⁶¹ A private nuisance is "a civil wrong, based on disturbance of rights in land." WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 572 (1971). Plaintiffs bringing a case of private nuisance are required to prove that: "(1) they have suffered substantial unreasonable interference with property use, (2) the interference was caused by defendant's use of its land, and (3) that the defendant acted 'intentionally.'" ZYGMUNT J. B. PLATER ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 112 (1992).

⁶² SACKMAN, *supra* note 54, at § 6.10[2], at 6-63 to 6-64; STOEBUCK, *supra* note 21, at 164.

⁶³ See STOEBUCK, *supra* note 21, at 21; see also SACKMAN, *supra* note 54, at 6-64.

⁶⁴ *Jacobson v. Crown Zellerbach Corp.*, 539 P.2d 641, 644 (Or. 1975) (holding property owner whose land abuts logging road could not sue logging truck company for vibration damage to house caused by passing logging trucks); see *Blumenthal v. City of Cheyenne*, 186 P.2d 556, 572 (Wyo. 1947) (declining to enjoin truck route through city where "the consequences complained of flow naturally and normally from the conduct of the traffic under proper authority"). But see *West v. National Mines Corp.*, 285 S.E.2d 670, 673-77 (W. Va. 1981) (finding actionable cause of nuisance against coal lessee and contract haulers existed where dust kicked up by coal trucks traveling on local road permeated homes, interfered with breathing, fouled water, and made sleeping difficult).

operation of that public use causes to private properties.⁶⁵ Thus, abutting landowners have no recourse against nongovernmental entities.⁶⁶

A few courts have applied an inverse condemnation theory and allowed compensation to noncondemned property owners whose properties have been adversely affected by their proximity to a new highway.⁶⁷ The circumstances in which the plaintiffs in these cases were harmed, however, are drastic and extreme.⁶⁸ For example, in *Thomsen v. State*, a newly constructed four lane highway passed within ten feet of the plaintiff's bedroom with only a wire fence separating the roadway from the plaintiff's property line.⁶⁹ The Supreme Court of Minnesota, after explaining that noise, light, fumes, and vibrations from traffic are ordinarily noncompensable inconveniences, nevertheless held that the plaintiff could recover damages.⁷⁰ The court observed that the "unique" and "unusual" facts of the case—the headlights of passing cars shining directly into the plaintiff's window, the loud noise of the traffic continuing throughout the day and night, and only a wire fence serving as protection from vehicles traveling at high speeds—led to the conclusion that the plaintiff was entitled to compensation.⁷¹

In light of the judicial reluctance to extend the constitutional takings concept to include noncondemned highway abutters, in the overwhelming majority of jurisdictions a property owner whose property is not at least partially condemned for a highway construction cannot recover damages under any legal theory.⁷² Evidently, to the extent that properties adjacent to highways endure the same damaging con-

⁶⁵ See *Griggs v. Allegheny County*, 369 U.S. 84, 89 (1962). In *Griggs*, the defendant municipality owned and leased an airport which was found to have imposed a servitude on the plaintiff's property. *Id.* Rather than hold the individual airlines and airplane operators liable for the taking, the Court held that the municipality, as constructor and owner of the airport, was responsible for the constitutional taking which had occurred as a result of the operation of the airport. *Id.*

⁶⁶ See *id.* This Comment uses the term "nongovernmental" to refer to purely private parties.

⁶⁷ *Harding v. Department of Transp.*, 205 Cal. Rptr. 561, 566 (Cal. App. 1984); *Thomsen v. State*, 170 N.W.2d 575, 578-79 (Minn. 1969); *Knight v. City of Missoula*, 827 P.2d 1270, 1276 (Mont. 1992); *Knight v. City of Billings*, 642 P.2d 141, 145-46 (Mont. 1982); *Board of Educ. v. Palmer*, 212 A.2d 564, 570-71 (N.J. Super. Ct. App. Div. 1965), *rev'd on other grounds*, 218 A.2d 153 (N.J. 1966); *Lambier v. City of Kennewick*, 783 P.2d 596, 600 (Wash. Ct. App. 1989), *rev. denied*, 791 P.2d 535 (Wash. 1990); *City of Yakima v. Dahlin*, 485 P.2d 628, 630-31 (Wash. Ct. App. 1971).

⁶⁸ See *infra* notes 69-71 and accompanying text.

⁶⁹ 170 N.W.2d at 577.

⁷⁰ *Id.* at 579.

⁷¹ *Id.* at 579-80; see *Palmer*, 212 A.2d at 570-71 (finding school entitled to compensation where newly constructed six-lane superhighway would circle school property, passing within 40 feet of school building); *City of Yakima*, 485 P.2d at 630-31 (compensating building owner for intolerable noise levels where 20-foot high wall of highway ramp constructed next to warehouse created echo chamber which amplified traffic noise).

⁷² See, e.g., *People ex rel. Dep't of Pub. Works v. Symons*, 357 P.2d 451, 455 (Cal. 1961);

sequences of highway noise, pollution, and safety hazards irrespective of whether the property has been condemned, the current judicial interpretation of takings law is arbitrary and hypocritical.⁷³ The losses sustained by two neighboring properties may be economically and physically similar. Under the majority view, however, if one of the properties has been partially condemned and the other has not, the former will be fully compensated and the latter will receive nothing.⁷⁴

Confronted with a similarly arbitrary and inequitable application of takings law in the context of property owners living near airports, courts have developed a theory of inverse condemnation to provide for a more just compensation of negatively affected property owners.⁷⁵ An application of this theory to the highway context may provide relief for highway abutters.

III. MAKING SENSE OF IT ALL FROM A BIRD'S-EYE VIEW: THE AIRPORT CASES

For several decades federal and state courts have awarded damages, on a theory of inverse condemnation, to plaintiffs whose properties are situated near airport takeoff and landing runways.⁷⁶ Although courts have disagreed as to what circumstances necessitate that a plaintiff receive compensation,⁷⁷ the decisions in these "airport cases" are premised upon the notion that the noise and pollution from airplanes flying close to property can effect a constitutionally cognizable taking of that property.⁷⁸ The theory of inverse condemnation

Northcutt v. State Rd. Dep't, 209 So. 2d 710, 712-13 (Fla. Dist. Ct. App. 1968), *cert. dismissed*, 219 So. 2d 687 (Fla. 1969); Department of Transp. v. Bonnett, 358 S.E.2d 245, 246 (Ga. 1987); Adams v. Department of Highways, 753 P.2d 846, 850 (Mont. 1988); Dennison v. State, 239 N.E.2d 708, 710 (N.Y. 1968).

⁷³ See *Harding v. Department of Transp.*, 205 Cal. Rptr. 561, 565 (Cal. Dist. Ct. App. 1984); *People v. Volunteers of Am.*, 98 Cal. Rptr. 423, 431 (Cal. Dist. Ct. App. 1971); PAUL, *supra* note 23, at 71; Van Alstyne, *supra* note 4, at 505.

⁷⁴ PAUL, *supra* note 23, at 71; Van Alstyne, *supra* note 4, at 506.

⁷⁵ See *infra* notes 109-43 and accompanying text.

⁷⁶ See, e.g., *United States v. Causby*, 328 U.S. 256, 266-67 (1946); *Branning v. United States*, 654 F.2d 88, 102 (Ct. Cl. 1981); *Foster v. City of Gainesville*, 579 So. 2d 774, 777 (Fla. Dist. Ct. App. 1991); *Thornburg v. Port of Portland*, 376 P.2d 100, 106 (Or. 1962) [hereinafter "*Thornburg I*"]; *Martin v. Port of Seattle*, 391 P.2d 540, 545-46 (Wash. 1964), *cert. denied*, 379 U.S. 989 (1965).

⁷⁷ See *Causby*, 328 U.S. at 266-67 (holding that only frequent low-level flights over plaintiffs' property constitute compensable taking of property); *Thornburg I*, 376 P.2d at 106 (holding that substantial interference with use and enjoyment of property constitutes compensable taking of property); *Martin*, 391 P.2d at 545-46 (holding that any interference with use and enjoyment of property constitutes compensable damaging or taking of property).

⁷⁸ See, e.g., *Causby*, 328 U.S. at 266-67; *Branning*, 654 F.2d at 102; *Foster*, 579 So. 2d at 777; *Thornburg I*, 376 P.2d at 106; *Martin*, 391 P.2d at 545-46.

as applied in the airport cases can provide a basis by which to award damages to property owners whose properties abut highways.⁷⁹

A. *The Airport Principle as Federally Expressed*

The first case that addressed the issue of government taking of private property rights by airplanes was *United States v. Causby*, which dealt with the issue of whether the adverse effects of airplanes flying directly over private property constitute a constitutionally recognized taking.⁸⁰ The plaintiff sued the government on a theory of inverse condemnation, alleging that the continuous passage directly over his property of low-flying military aircraft from a nearby airbase was destroying the operation of his chicken ranch and thus was akin to a governmental taking of his property absent formal condemnation proceedings.⁸¹ The Supreme Court agreed, explaining that where flights over property render the property uninhabitable, a taking occurs under the Fifth Amendment to the Constitution which constitutes a loss as complete as if the government had taken exclusive possession of the land through normal eminent domain procedures.⁸² The Court termed this acquired property right an "easement of flight."⁸³ The Court held that flights over an individual's private land are a taking if "they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of [a plaintiff's] land."⁸⁴ In applying this standard to the facts of the case, the Court determined that the government had imposed a "servitude" on the land and thus had taken an easement from the plaintiff which required compensation.⁸⁵ Although *United States v. Causby* was a watershed decision because of the Court's expansive reading of property rights and constitutional takings,⁸⁶ the Court's holding was limited to the

⁷⁹ See STOEBCUK, *supra* note 21, at 236; Donald S. Black, Note, *The Highway Cases: Noise As a Taking or Damaging of Property in California*, 20 SANTA CLARA L. REV. 425, 441 (1980).

⁸⁰ 328 U.S. at 258.

⁸¹ *Id.* at 258-59.

⁸² *Id.* at 261.

⁸³ *Id.* In *Branning v. United States*, the United States Court of Claims noted:

Such "taking" has been referred to in reported cases variously as an "navigation easement" (by analogy to the sovereign's right of navigational servitude in navigable waters of the sovereignty) and as an "easement of flight" (by analogy to easements taken by the sovereign in the airspace over land for public purposes).

654 F.2d 88, 91 n.1 (Ct. Cl. 1981).

⁸⁴ *Causby*, 328 U.S. at 266.

⁸⁵ *Id.* at 267.

⁸⁶ See Stoebeck, *supra* note 6, at 220-21.

extent that it applied only to the rare situation in which airplanes fly directly over a plaintiff's property.⁸⁷

The Supreme Court adhered to *Causby's* limited holding less than twenty years later in *Griggs v. Allegheny County*.⁸⁸ In *Griggs*, the Court held that the defendant municipality, not the actual operators of the airplanes, was liable for taking an avigation easement from several homeowners.⁸⁹ The Court held that the noise and vibrations created by low-altitude, commercial flights originating from a county airport flying directly over the plaintiffs' properties rendered the properties unfit for residential use.⁹⁰ Citing *Causby*, the Court explained that "an invasion of the superadjacent airspace will often affect the use of the surface of the land itself."⁹¹

The holdings of both *Causby* and *Griggs* were premised on trespass theory,⁹² with the Court determining that an avigation easement had been taken because the airplanes in both situations had physically invaded the airspace over the plaintiffs' property.⁹³ Neither of these two decisions, nor any subsequent Supreme Court decision, has addressed the issue of compensation for property owners who live near

⁸⁷ See *Causby*, 328 U.S. at 266.

⁸⁸ 369 U.S. 84, 88-89 (1962).

⁸⁹ *Id.*

⁹⁰ *Id.* at 87-89.

⁹¹ *Id.* at 89 (citing *Causby*, 328 U.S. at 265).

⁹² Trespass to land—a tort to property—generally "requires an intentional entry upon land of another . . . by personal entry or by causing an object to enter the land." DAN B. DOBBS, *TORTS AND COMPENSATION* 57 (1985).

⁹³ See *Griggs*, 369 U.S. at 88-89; *Causby*, 328 U.S. at 266. Such an "invasion of airspace" analysis relies on the notion that a property owner's interest in the exclusive possession of their property extends above and below the ground surface. See PROSSER, *supra* note 61, at 69. Courts and commentators have frequently cited Lord Coke's utterance that "*cujus est solum ejus est usque ad coelum*"—he who possesses the land owns "upward unto heaven, and by analogy, downward into perdition." *Id.* at 70. However, the Supreme Court, in *Causby*, limited this heaven-to-hell notion, explaining in quite colorful language that "that doctrine has no place in the modern world . . . common sense revolts at the idea." 328 U.S. at 261. The Court stated that federal statutes regulating navigational air space and operational altitudes for aircraft, coupled with the regulations of the Civil Aeronautics Board, limited private ownership of property to that air space below the prescribed minimum altitudes of flight. *Id.* at 260-63. The Court asserted that the air space above the prescribed minimum altitudes is public domain. *Id.* at 263. In both *Causby* and *Griggs*, the aircraft at issue took off and landed over the plaintiffs' properties and below the prescribed minimum altitudes, and thus within the air space possessed by the plaintiffs. See *Griggs*, 369 U.S. at 88-89; *Causby*, 328 U.S. at 266. However, at least one state court has interpreted the *Causby* and *Griggs* holdings to be less concerned with "a physical displacement of air above the property," and more reliant upon the damages caused by noise and vibration. *Martin v. Port of Seattle*, 391 P.2d 540, 545 (Wash. 1964), *cert. denied*, 379 U.S. 989 (1965). But see *Thornburg I*, 376 P.2d 100, 103 (Or. 1962) (interpreting *Causby* and *Griggs* to rely on trespass theory exclusively).

an airport where airplanes fly at low altitudes but do not fly directly over the affected properties.

The United States Court of Appeals for the Tenth Circuit, however, did address the issue of compensation for property owners who live near but not under the direct path of low-flying aircraft in *Batten v. United States*.⁹⁴ In *Batten*, the plaintiffs owned property near an airport but the property did not lay directly under airplane flight paths.⁹⁵ Although airplanes did not pass over the property, the plaintiffs alleged that the takeoffs and landings of airplanes nonetheless produced sound and shock waves on the property up to twenty decibels beyond the level at which air force personnel are required to wear earplugs.⁹⁶ Airplanes caused dishes and windows to rattle, made conversation and use of televisions impossible, interrupted sleep, and produced a smoke which left a black oily residue over plaintiffs' property.⁹⁷ Despite these compelling circumstances, the court held that the appropriate legal principles provided compensation for damages only where there had been an actual taking.⁹⁸ The court asserted that in this case there had been "nothing more than an interference with [the] use and enjoyment" of the plaintiffs' property, and thus no compensation was available.⁹⁹

Chief Justice Murrah wrote a scathing dissent in *Batten*.¹⁰⁰ Chief Justice Murrah began his dissent by noting that a property owner's peaceful enjoyment of his or her home is a "constitutionally protected property right."¹⁰¹ Furthermore, the property owners' injured economic interest in this case was indistinguishable from that which the Supreme Court had pronounced "taken" in *Causby* and *Griggs*.¹⁰² Arguing that a constitutional taking does not turn on whether there has been an actual physical invasion of property, Murrah explained that "the Government may surely accomplish by indirect interference, the equivalent of an outright physical invasion."¹⁰³ In support of this proposition, Murrah cited the Supreme Court case of *Richards v. Washington Terminal*.¹⁰⁴ In *Richards*, the Court held that although

⁹⁴ 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

⁹⁵ *Id.* at 582.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 583.

⁹⁹ *Id.* at 585.

¹⁰⁰ *Id.* (Murrah, C.J., dissenting).

¹⁰¹ *Id.* at 585-86.

¹⁰² *Id.* at 586; *see supra* notes 80-91 and accompanying text.

¹⁰³ *Batten*, 306 F.2d at 586 (Murrah, C.J., dissenting).

¹⁰⁴ *Id.* (citing *Richards v. Washington Terminal*, 233 U.S. 546 (1914)).

general damages to property from a nearby railroad were *damnum absque injuria*,¹⁰⁵ those damages which were special and peculiar to a plaintiff's property created a burden that required compensation.¹⁰⁶ From this, Murrah then delineated his constitutional test:

First, whether the asserted interest is one which the law will protect; if so, whether the interference is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause us to conclude that fairness and justice, as between the State and the citizen, requires the burden imposed to be borne by the public and not by the individual alone.¹⁰⁷

Chief Justice Murrah's dissent has formed the basis of the reasoning in the majority of the state decisions in the airport cases.¹⁰⁸

B. *The Airport Principle as Stated by the States*

The leading state decision in the airport inverse condemnation cases is the Oregon case of *Thornburg v. Port of Portland (Thornburg I)*.¹⁰⁹ In *Thornburg I*, the plaintiffs lived near an airport but the plaintiffs' properties were not directly under the flight paths of airplanes departing from and landing at the airport.¹¹⁰ The plaintiffs claimed that the noise from the aircraft was a nuisance which had legally ripened into an easement, much as a nuisance by a private party can ripen into a prescription.¹¹¹ Because the easement had been taken by a municipality, the plaintiffs contended that the easement constituted an unconstitutional taking, compensable under the theory of inverse condemnation.¹¹²

In a well-reasoned decision, the Oregon Supreme Court laid out the analysis which supported the plaintiffs' claims.¹¹³ Laying the foundation of its takings analysis, the court began with an acknowledgment

¹⁰⁵ "Damnum absque injuria" is defined as indicating "loss, hurt, or harm without injury in the legal sense; that is, without such breach of duty as is redressible by a legal action." BLACK'S LAW DICTIONARY 393 (6th ed. 1990).

¹⁰⁶ *Richards v. Washington Terminal*, 233 U.S. 546, 551 (1914). The "special and peculiar" damages in *Richards* referred to those damages caused by the extra smoke and soot that was directly blown onto the plaintiff's property by a fanning system that had been constructed to ventilate a railroad tunnel. *Id.* at 557.

¹⁰⁷ *Batten*, 306 F.2d at 587 (Murrah, C.J., dissenting).

¹⁰⁸ *See, e.g., Thornburg I*, 376 P.2d 100, 104 (Or. 1962); *Martin v. Port of Seattle*, 391 P.2d 540, 546 (Wash. 1964), *cert. denied*, 379 U.S. 989 (1965).

¹⁰⁹ 376 P.2d at 100.

¹¹⁰ *Id.* at 101. *Cf. Batten*, 306 F.2d at 582, 585 (plaintiffs' property did not lie directly under flight paths of airplanes from nearby airport and thus plaintiffs not entitled to compensation for consequential damages).

¹¹¹ *Thornburg I*, 376 P.2d at 102.

¹¹² *Id.*

¹¹³ *Id.* at 102-11.

that noise can be a legal nuisance which, if loud enough or continuous enough, can ripen into an easement.¹¹⁴ The court explained that unreasonable noise can be a nuisance which, under common law, could be imposed upon one's neighbor by prescription as an easement for a nuisance.¹¹⁵ The court noted, however, that freedom from unreasonable noise was also a protectable right, similar to other nuisance cases which had remedied an aggrieved party for being subjected to offensive smells.¹¹⁶

After establishing that a noise could be a nuisance which could ripen into an easement, the court proceeded to determine that "a nuisance can be such an invasion of the rights of a possessor as to amount to a taking, in theory at least, any time a possessor is in fact ousted from the enjoyment of his [sic] land."¹¹⁷ The court established, however, that it would only recognize a taking in circumstances where "the government substantially deprives the owner of the use of his land."¹¹⁸

In further departing from the federal standard, the Oregon Supreme Court reasoned that noise coming from a location next to one's property can be just as damaging as noise originating perpendicularly from above one's property.¹¹⁹ The court argued that the angle from which the nuisance arose was irrelevant to the determination of the taking as long as there was a substantial deprivation of the use and the enjoyment of the property.¹²⁰ The court refused to adopt the requirement adopted by most federal and state courts that the noise originate from a certain position in relation to a plaintiff's property.¹²¹ Such a requirement, the court reasoned, is arbitrary and contrary to

¹¹⁴ *Id.* at 102. An easement has been defined as "the right to enter upon and make some defined use of, but not have possession or seisin of, land owned by another." STOEBC, *supra* note 21, at 123.

¹¹⁵ *Thornburg I*, 376 P.2d at 102. Prescription refers to the "acquisition of a personal right to use a way, water, light and air by reason of continuous usage." BLACK'S LAW DICTIONARY 1183 (6th ed. 1990). An easement by prescription is created where an individual's permissive use of another's property has been "open, continuous, exclusive, and under claim of right for [a] statutorily prescribed period with knowledge or imputed knowledge of the owner." *Id.*

¹¹⁶ *Thornburg I*, 376 P.2d at 103. Various courts have held that odors from sewage plants can be a nuisance that can ripen into a prescriptive easement. *See, e.g., City of Fayetteville v. Stanberry*, 807 S.W.2d 26, 27-28 (Ark. 1991) (holding overflow and odor emanations from sewer line over period of time constituted continuing nuisance that had ripened into inverse condemnation); *Duffield v. DeKalb County*, 249 S.E.2d 235, 237 (Ga. 1978) (holding noise and odors from water pollution control plant constituted unlawful interference with property owner's right to use and enjoy property and thus constituted claim for inverse condemnation).

¹¹⁷ *Thornburg I*, 376 P.2d at 105. The *Thornburg I* decision was apparently written before courts began to recognize that women possess land too.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 106.

¹²⁰ *Id.*

¹²¹ *Id.* at 107-09.

the logic of the taking argument insofar as the inquiry rests upon the interference with plaintiffs' use of their property irrespective of the position of the source of the interference.¹²²

The Oregon Supreme Court had an opportunity to further explain this theory of law when the plaintiffs from the *Thornburg I* decision appeared before the court on another appeal in *Thornburg II*, following a remand from the first case.¹²³ The jury in the remanded case had been instructed, pursuant to some vague language in *Thornburg I*, to weigh the social utility of the airport against the taking of property asserted by the plaintiffs before determining the appropriate award for damages.¹²⁴ In rejecting this balancing test, the court specifically cited to Chief Justice Murrah's dissent in *Batten* in holding that if the government's activities substantially interfered with the plaintiffs' use and enjoyment of their property, a taking occurred which must be compensated, irrespective of the utility of the public use.¹²⁵ The court declared that the benefit to the public in general from a particular public use did not diminish the individual property owner's damage claims.¹²⁶

The *Thornburg* decisions represent a significant extension of the taking theory found in *Causby* and *Griggs*.¹²⁷ The *Thornburg* decisions shifted the focus of judicial inquiry from the location of the source of the interference to the actual damage caused by the interference.¹²⁸ One commentator has termed this inverse condemnation argument, "condemnation-by-nuisance."¹²⁹

Since the decision in *Thornburg I*, a number of other state courts have been confronted with similar inverse condemnation actions involving property owners who live near airports.¹³⁰ These courts have almost universally followed the *Thornburg* court's analysis.¹³¹ For ex-

¹²² *Id.*

¹²³ *Thornburg v. Port of Portland*, 415 P.2d 750 (Or. 1966) [hereinafter "*Thornburg II*"].

¹²⁴ *Id.* at 751-52 (citing *Thornburg I*, 376 P.2d 100, 107 (Or. 1962)).

¹²⁵ *Id.* at 752.

¹²⁶ *Id.* at 753.

¹²⁷ See Stoebuck, *supra* note 6, at 220-21.

¹²⁸ See Black, *supra* note 79, at 440.

¹²⁹ Stoebuck, *supra* note 6, at 209.

¹³⁰ See, e.g., *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 705 P.2d 866 (Cal. 1985), *cert. denied*, 475 U.S. 1017 (1986); *City of Jacksonville v. Schumann*, 167 So. 2d 95 (Fla. Dist. Ct. App. 1964), *cert. denied*, 172 So. 2d 597 (Fla. 1965); *Alevizos v. Metropolitan Airports Comm'n of Minneapolis & St. Paul*, 216 N.W.2d 651 (Minn. 1974); *Henthorn v. City of Oklahoma City*, 453 P.2d 1013 (Okla. 1969); *Martin v. Port of Seattle*, 391 P.2d 540 (Wash. 1964), *cert. denied*, 379 U.S. 989 (1965).

¹³¹ See, e.g., *Baker*, 705 P.2d at 868; *City of Jacksonville*, 167 So. 2d at 102; *Alevizos*, 216 N.W.2d at 662; *Henthorn*, 453 P.2d at 1016; *Martin*, 391 P.2d at 546.

ample, in *Martin v. Port of Seattle*, the Washington Supreme Court relaxed the burden on the inverse condemnation plaintiff even further than that which *Thornburg I* established.¹³² In *Martin*, plaintiffs alleged a set of facts similar to those in *Thornburg I*, including proximity to an airport and the resulting deleterious effects attributable to the flights of nearby aircraft.¹³³ The Washington Supreme Court likewise dismissed the position that a taking requires a trespass.¹³⁴ The court concluded that the taking analysis turned on the actual interference with the plaintiffs' use and enjoyment of their property.¹³⁵ In articulating the inherent inequity of a trespass requirement, the court explained that it was "unable to accept the premise that recovery for interference with the use of land should depend upon anything as irrelevant as whether the wing tip of an aircraft passes through some fraction of an inch of the airspace directly above the plaintiff's land."¹³⁶ The court also noted that because the Washington constitution's eminent domain clause has a "damaging" provision that mandates compensation for private property that is either taken or damaged for public use, a physical invasion or direct overflight is unnecessary to establish a cause of action.¹³⁷

In differentiating itself from the *Thornburg* decisions, the *Martin* court stated that the level of interference required before the court would recognize that a taking had occurred need not be substantial,¹³⁸ the standard established by the Oregon Supreme Court in *Thornburg I*.¹³⁹ The court reasoned that recovery in actions of inverse condemnation are based on a reduction in the property's market value. Thus, frivolous, incidental damages automatically would be precluded from recovery because such damages would not effect a measurable decline in market value.¹⁴⁰ However, less-than-substantial damages, which would effect a decline in market value but would otherwise be excluded under a substantiality standard, would be recoverable.¹⁴¹ The court explained that it is illogical to suggest that simply because an injury is small the injury should be unrecoverable.¹⁴² After all, the

¹³² 391 P.2d at 546.

¹³³ *Id.* at 542-43.

¹³⁴ *Id.* at 545.

¹³⁵ *Id.* at 546.

¹³⁶ *Id.* at 545.

¹³⁷ *Id.* at 546.

¹³⁸ *Id.*

¹³⁹ See 376 P.2d 100, 105 (Or. 1962).

¹⁴⁰ *Martin*, 391 P.2d at 547.

¹⁴¹ See *id.*

¹⁴² *Id.*

court reasoned, the public's burden to pay for a small burden is equally as small.¹⁴³

IV. SHIFTING INTO HIGH GEAR: APPLYING "CONDEMNATION-BY-NUISANCE" TO THE HIGHWAY CASES

It would seem a small logical step to apply the "condemnation-by-nuisance" theory advanced in *Thornburg* and the subsequent airport cases to the situation of the property owner who lies adjacent to a highway.¹⁴⁴ If noise, smoke, fumes, dust, and vibrations from airplanes can interfere so substantially with individuals' use and enjoyment of their property, then noise, smoke, fumes, dust, and vibrations, as well as intense lights and increased safety hazards, from a highway can similarly interfere with noncondemned individuals' use and enjoyment of their property.¹⁴⁵ Despite its theoretical soundness, this argument has not approached a level of universal acceptance in most jurisdictions. To the contrary, most courts have resisted compensating highway abutters whose properties have not been at least partially condemned.¹⁴⁶

A. *State Courts that Have Heard the Noise and Seen the Light: Successful Claims in Inverse Condemnation*

A limited number of state courts have held that plaintiffs whose properties abut highways are entitled to compensation under their state constitutions.¹⁴⁷ The facts of these cases, however, tend to be unusual and extreme, such as where the construction of a neighboring highway resulted in a virtual destruction of adjacent landowners' use of their property.¹⁴⁸ Nonetheless, a few courts have applied a condemnation-by-nuisance analysis—although not labeled as such—in cases where the facts are not as dramatic but are nonetheless compelling.¹⁴⁹

¹⁴³ *Id.*

¹⁴⁴ See *Harding v. Department of Transp.*, 205 Cal. Rptr. 561, 565 (Cal. Dist. Ct. App. 1984); *STOEBCUK*, *supra* note 21, at 163.

¹⁴⁵ *STOEBCUK*, *supra* note 21, at 163.

¹⁴⁶ See *supra* notes 54–74 and accompanying text.

¹⁴⁷ See *Harding*, 205 Cal. Rptr. at 566; *Thomsen v. State*, 170 N.W.2d 575, 580 (Minn. 1969); *Knight v. City of Missoula*, 827 P.2d 1270, 1276 (Mont. 1992); *Knight v. City of Billings*, 642 P.2d 141, 145 (Mont. 1982); *Board of Educ. v. Palmer*, 212 A.2d 564, 571 (N.J. Super. Ct. App. Div. 1965), *rev'd on other grounds*, 218 A.2d 153 (N.J. 1966); *Lambier v. City of Kennewick*, 783 P.2d 596, 600 (Wash. Ct. App. 1989), *review denied*, 791 P.2d 535 (Wash. 1990); *City of Yakima v. Dahlin*, 485 P.2d 628, 630–31 (Wash. Ct. App. 1971).

¹⁴⁸ See *supra* notes 68–71 and accompanying text.

¹⁴⁹ See *infra* notes 150–60 and accompanying text.

The Supreme Court of Montana has twice held that plaintiffs in inverse condemnation cases whose properties were in close proximity to a newly constructed or widened roadway were entitled to compensation although no portions of the properties involved had been condemned.¹⁵⁰ In *Knight v. City of Billings*, the city, in widening a major arterial street, condemned properties on the east side of the street for the construction project but did not condemn any of the plaintiffs' properties on the west side of the street.¹⁵¹ The plaintiffs complained that the widening of the street resulted in a number of accidents in front of and on their properties which made it unsafe for their children to play on their lawns; rocks and rubbish being thrown onto their lawns and houses; noise so loud that doors had to be kept shut and sleep at night was difficult; dust and fumes that prevented people from ventilating their homes; vibrations which constantly shook houses; and the installation of new high intensity lights which created a glare.¹⁵² The court, citing the airport cases, held that the interference with the plaintiffs' "right to the peaceful possession of [their] residential property" was direct, peculiar, and of sufficient magnitude so as to constitute a taking by inverse condemnation.¹⁵³

The Supreme Court of Montana reasoned similarly in the more recent case of *Knight v. City of Missoula*.¹⁵⁴ In *City of Missoula*, a new road opened near the plaintiffs' neighborhood that increased traffic, dust, noise, and runoff problems in the vicinity and resulted in increased health problems, physical danger, and the plaintiffs' loss of the use and enjoyment of their homes and properties.¹⁵⁵ In remanding the case back to the state district court, the Supreme Court of Montana explained that where "actual physical damage is proximately caused" to one's property by a public improvement, there may be a recovery in inverse condemnation as long as the "extent of damage be of such degree as to amount to a taking of an interest in the property damaged."¹⁵⁶

¹⁵⁰ *City of Missoula*, 827 P.2d at 1276; *City of Billings*, 642 P.2d at 145.

¹⁵¹ 642 P.2d 141, 142 (Mont. 1982).

¹⁵² *Id.* at 143.

¹⁵³ *Id.* at 145-46.

¹⁵⁴ 827 P.2d 1270, 1276 (Mont. 1992). Apparently it is not easy having the last name "Knight" if you live in Montana: the plaintiffs in both Montana highway condemnation cases were named Knight. However, the "Knights" in *Knight v. City of Billings* were Earle and Hazel, 642 P.2d at 141, whereas the "Knights" in *City of Missoula* were Lorraine and the estate of her deceased husband, Ford, 827 P.2d at 1270.

¹⁵⁵ *Id.* at 1273.

¹⁵⁶ *Id.* at 1276. Cf. *Adams v. Department of Highways*, 753 P.2d 846 (Mont. 1988). In *Adams*, a new bridge, located one-quarter of a mile from the plaintiffs' properties, was opened, increasing traffic on a roadway that plaintiffs' properties abutted. *Id.* at 846-47. Although the Montana

The California Court of Appeals for the Fourth District made an even clearer application of the condemnation-by-nuisance theory in the airport cases to a highway case.¹⁵⁷ In *Harding v. Department of Transportation*, the California Department of Transportation purchased several pieces of property for the widening of a highway.¹⁵⁸ Plaintiffs, whose properties abutted the new highway right-of-way, brought a multifaceted claim that alleged damages from noise, dust, dirt, and debris from the highway as well as a loss of air and light and increased temperatures from the construction of an embankment—a sound attenuation barrier—on the right-of-way.¹⁵⁹ After rejecting a common law nuisance claim on grounds of statutorily-authorized governmental immunity, the court turned to the plaintiffs' inverse condemnation claim.¹⁶⁰ The court, after commenting on the incongruous results produced by a physical invasion requirement and noting that most courts have rejected an analogous direct overflight requirement in the airport cases, held that the plaintiffs' unique damages should be compensable under the inverse condemnation principle.¹⁶¹

In each of the foregoing cases, courts applied the same theory of inverse condemnation which has supported numerous claims in the airport cases context to highway takings claims. These courts, however, do not reflect the majority view. Although the majority of courts consistently uphold inverse condemnation claims by adversely affected plaintiffs living near airports, they have exhibited a reluctance to apply the same theory to adversely affected highway abutters, offering a variety of arguments in opposition to such a course of action.¹⁶²

Supreme Court acknowledged that a successful claim in inverse condemnation does not require an actual physical invasion of the property, the court held that the plaintiffs had suffered a noncompensable injury. *Id.* at 848. Aside from noting that a potential "Pandora's Box" could be opened if the plaintiffs were allowed recovery and that the inconveniences of traffic increases must inevitably follow a road improvement, the court—exhibiting a keen economic instinct coupled with a dismal grasp of the concept of "home"—stated that the plaintiffs' properties were zoned residential/commercial and thus the properties may have increased in value as commercial property. *Id.* at 850-53.

¹⁵⁷ See *Harding v. Department of Transp.*, 205 Cal. Rptr. 561, 562 (Cal. Dist. Ct. App. 1984).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 563.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 565-66. Referring to the highway cases, the court explained, "people suffering damages from their proximity to a highway should not be unequally required to allege and prove a physical invasion." *Id.* at 566.

¹⁶² See *infra* notes 163-93 and accompanying text.

*B. Clearing the Smoke for Those Courts that Have Taken the
Other Route: An Analysis of the Arguments Surrounding the
Highway Cases*

Despite the reasonableness and internal consistency of the condemnation-by-nuisance argument, many courts and commentators have resisted applying this theory of recovery to landowners whose properties abut highways.¹⁶³ Ironically, some jurisdictions that have applied the condemnation-by-nuisance theory to property owners living near airports have denied compensation to property owners living near highways.¹⁶⁴ Courts have advanced several arguments in denying compensation to highway abutters.

1. Noise

At least one court has argued that the airport cases are distinguishable from the highway cases insofar as the noise emitted from automobiles is not comparable to the noise produced by airplanes.¹⁶⁵ However, this assertion does not defeat the validity of the theory of inverse condemnation in an appropriate case.¹⁶⁶ If courts are willing to apply the "substantial interference" test articulated in *Thornburg I*,¹⁶⁷ circumstances could conceivably arise where the noise from highway traffic interferes with a property owner's use and enjoyment of his or her property to the same extent as noise from airplanes.¹⁶⁸

¹⁶³ See, e.g., *People ex rel. Dep't of Pub. Works v. Symons*, 357 P.2d 451, 454 (Cal. 1961); *Northcutt v. State Rd. Dep't*, 209 So. 2d 710, 713 (Fl. Dist. Ct. App. 1968), *cert. dismissed*, 219 So. 2d 687 (Fla. 1969); *Department of Transp. v. Bonnett*, 358 S.E.2d 245, 246 (Ga. 1987); *Adams v. Department of Highways*, 753 P.2d 846, 850, 853 (Mont. 1988); *Dennison v. State*, 239 N.E.2d 708, 710 (N.Y. 1968).

¹⁶⁴ In Florida, the state appellate courts have routinely compensated property owners whose properties lie near or under the flight paths of airplanes taking off from and landing at nearby airports. See *Foster v. City of Gainesville*, 579 So. 2d 774, 776-77 (Fla. Dist. Ct. App. 1991); *City of Jacksonville v. Schumann*, 167 So. 2d 95, 102 (Fla. Dist. Ct. App. 1964), *cert. denied*, 172 So. 2d 597 (Fla. 1965). However, in *Northcutt v. State Rd. Dep't*, the Florida District Court of Appeals for the Third District expressly declined to apply the holdings of the airport cases to a situation where a property owner's house and property, and the beneficial use and enjoyment thereof, were damaged from the construction and operation of an adjacent highway. 209 So. 2d at 711-12.

¹⁶⁵ *Northcutt*, 209 So. 2d at 711.

¹⁶⁶ See Black, *supra* note 79, at 443.

¹⁶⁷ 376 P.2d 100, 106-07 (Or. 1962).

¹⁶⁸ See *Harding v. Department of Transp.*, 205 Cal. Rptr. 561, 566 (Cal. Dist. Ct. App. 1984); *Thomsen v. State*, 170 N.W.2d 575, 580 (Minn. 1969); *City of Yakima v. Dahlin*, 485 P.2d 628, 629-31 (Wash. Ct. App. 1971).

Furthermore, the noise level of highway traffic need not reach the noise level of air traffic in order to constitute an interference so substantial as to effect a taking of property.¹⁶⁹ The noise level created by a continuous volume of passing traffic can interfere with property owners' use and enjoyment of their property without reaching the shock wave-producing levels of jet airplanes.

Moreover, highway traffic produces unique elements of nuisance which airplanes do not. Automobiles and trucks produce noxious gases and fumes at concentrated levels, and kick up dirt and debris, which can substantially interfere with individuals' use and enjoyment of property.¹⁷⁰ Highways also have attendant safety risks, such as accidents from reckless drivers careening off the roadway, which can rise to the level of a taking.¹⁷¹ Additionally, the glare from the headlights of passing vehicles can interfere with a highway abutter's use and enjoyment of his or her property.¹⁷² Finally, courts have recognized

¹⁶⁹ See Black, *supra* note 79, at 443.

¹⁷⁰ See *State v. Board of Educ.*, 282 A.2d 71, 76 (N.J. Super. Ct. Law Div. 1971).

One commentator has argued that "if [gases and smoke] are turned into the air and allowed to pass over adjacent land so as to deprive the owner of the beneficial use of his property, it is as much a taking as if it were sewage or water that caused the injury." SACKMAN, *supra* note 54, at § 6.10[1] at 6-59.

The Organization for Economic Cooperation and Development reported the hazardous effects of automobile-produced air pollution, explaining that:

[E]missions [from automobiles] of carbon monoxide, nitrogen oxides, hydrocarbons, lead and other particulate matter, as well as photochemical oxidants, acid deposition, and carbon dioxide, directly and indirectly cause: health effects (irritation of respiratory, eye, or other systems; acute toxic systemic effects; mutagenic or carcinogenic actions; adverse effects on defense mechanisms against infections); environmental damage (material soiling; corrosion; loss of agricultural productivity; acidification of soil and water; forest dieback); or nuisance (odor, decreased visibility).

ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *TRANSPORT AND THE ENVIRONMENT* 49 (1988).

¹⁷¹ *Lambier v. City of Kennewick*, 783 P.2d 596, 597 (Wash. Ct. App. 1989), *review denied*, 791 P.2d 535 (Wash. 1990). As a result of the widening of a roadway near the plaintiffs' property, at least 11 vehicles crashed on the plaintiffs' property or into their house, causing significant damage to their property, resulting in the loss of their insurance policy and the collapse in the market value of their home. *Id.* The Washington Court of Appeals, citing to *Thornburg I*, 376 P.2d 100 (Or. 1962) and *Martin v. Port of Seattle*, 391 P.2d 540 (Wash. 1964), *cert. denied*, 379 U.S. 989 (1965), held that the interference with the plaintiffs' use and enjoyment of their property caused by the road widening constituted a compensable taking. *Id.* at 598-600; see *Knight v. City of Billings*, 642 P.2d 141, 143 (Mont. 1992) (numerous accidents from automobiles on or near plaintiffs' properties following widening of roadway was element of interference which constituted taking by inverse condemnation). *But see* *Reisenauer v. State*, 813 P.2d 375, 380 (Idaho Ct. App. 1991) (widening of highway which resulted in multiple accidents on plaintiff's yard, including accident where motorist crashed into child's bedroom, was not compensable taking because state had compensated previous landowners for right of way approximately 50 years beforehand).

¹⁷² See *Richmond County v. Williams*, 137 S.E.2d 343, 344 (Ga. 1964); *City of Billings*, 642 P.2d at 143.

that the deleterious effects to property caused by close proximity to a highway are compensable when there has been a partial condemnation.¹⁷³ It is illogical to assume that the same effects are not serious enough to warrant compensation where there has been no condemnation.¹⁷⁴ After all, it is the proximity of an individual's property to a highway which determines the amount of damage to the property from the highway, not whether a part of the property has been condemned for the highway construction.¹⁷⁵

2. Shared Burden

Courts and commentators also maintain that highway noise and pollution are unpleasant consequences of a modern, urban, and highly mobile society.¹⁷⁶ Because, they assert, traffic noise is heard by everyone, such noise is a common burden shared by everyone.¹⁷⁷ However, this argument ignores the fact that not all property owners share the burden of highway noise and pollution equally.¹⁷⁸ Studies have shown that highway abutters suffer the annoyances of highways to a greater degree than that suffered by nonabutters.¹⁷⁹ The intensity of highway noise varies from location to location, depending on a variety of factors, including the distance between the properties and the highway, the topography of the surrounding area, and the insulating effect of neighboring buildings.¹⁸⁰ Furthermore, the speed, flow, and density of traffic also affect noise levels.¹⁸¹ Higher noise levels also are observable in areas where the number of vehicles traveling a particular section of highway is substantial or in areas where the traffic tends to follow a stop-and-go pattern.¹⁸² Additionally, the type of traffic can

¹⁷³ See *supra* notes 33-53 and accompanying text.

¹⁷⁴ See Van Alstyne, *supra* note 4, at 505.

¹⁷⁵ See *id.* at 504-06.

¹⁷⁶ See, e.g., *Northcutt v. State Rd. Dep't*, 209 So. 2d 710, 712 (Fla. Dist. Ct. App. 1968), *cert. dismissed*, 219 So. 2d 687 (Fla. 1969); *State v. Mertz*, 778 S.W.2d 366, 368 (Mo. Ct. App. 1989); *Adams v. Department of Highways*, 753 P.2d 846, 850 (Mont. 1988); *Dennison v. State*, 239 N.E.2d 708, 712 (N.Y. 1968) (Bergan, J., dissenting).

¹⁷⁷ See, e.g., *Northcutt*, 209 So. 2d at 712; *Mertz*, 778 S.W.2d at 368; *Adams*, 753 P.2d at 850; *Dennison*, 239 N.E.2d at 712 (Bergan, J., dissenting).

¹⁷⁸ See *Harding v. Department of Transp.*, 205 Cal. Rptr. 561, 566 (Cal. Ct. App. 1984); *Thomsen v. State*, 170 N.W.2d 575, 580 (Minn. 1969); *City of Yakima v. Dahlin*, 485 P.2d 628, 629-31 (Wash. Ct. App. 1971).

¹⁷⁹ U.S. DEP'T OF TRANSP., *supra* note 13, at 22-26.

¹⁸⁰ ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *FIGHTING NOISE IN THE 1990S* 61 (1991); see *City of Yakima*, 485 P.2d at 629-30 (finding newly constructed highway ramp next to plaintiff's warehouse created echo chamber which amplified noise to intolerable levels).

¹⁸¹ ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *URBAN TRAFFIC NOISE* 35 (1971).

¹⁸² *Id.*

affect the noise level coming from the highway insofar as trucks create more noise than other vehicles.¹⁸³

3. Cost

Another argument frequently advanced to oppose compensating highway abutters suggests that compensating noncondemned abutting landowners would cause the costs of highway construction to skyrocket, effectively halting the development of the nation's infrastructure.¹⁸⁴ The damages inflicted on abutting property owners, however, are a real cost of the operation of highways, just as cement, girders, and rights-of-way are parts of the costs of a highway.¹⁸⁵ Currently, the cost of damages to abutting properties is being paid for by those landowners whose properties were not partially condemned.¹⁸⁶ It is unfair for the state to shift disproportionately the burden of these substantial, hidden costs to noncondemned, abutting landowners.¹⁸⁷

Furthermore, by substantially interfering with property owners' use and enjoyment of their property, the government, under the theory of condemnation-by-nuisance, has taken the property from the individual in violation of the Constitution.¹⁸⁸ Therefore, such a violation demands redress irrespective of the costs such compensation imposes.¹⁸⁹ The constitutional requirement of just compensation for public taking of private property not only protects individuals against uncompensated loss, but also ensures that the government does not confiscate property for public projects that the government cannot otherwise afford.¹⁹⁰

Moreover, given that there has been no floodgate of litigation or crippling demand for compensation in the aviation field following the

¹⁸³ *City of Tulsa v. Mingo Sch. Dist. No. 16*, 559 P.2d 487, 489 (Okla. Ct. App. 1976).

¹⁸⁴ *See, e.g., People ex rel. Dep't of Pub. Works v. Symons*, 357 P.2d 451, 455 (Cal. 1961); *Northcutt v. State Rd. Dep't*, 209 So. 2d 710, 711 (Fla. Dist. Ct. App. 1968), *cert. dismissed*, 219 So. 2d 687 (Fla. 1969); *Thomsen v. State*, 170 N.W.2d 575, 579 (Minn. 1969); *Adams v. Department of Highways*, 753 P.2d 846, 850 (Mont. 1988); *Harris County v. Felts*, 881 S.W.2d 866, 869 (Tex. Ct. App. 1994).

¹⁸⁵ *See Van Alstyne, supra* note 4, at 543.

¹⁸⁶ *See id.*

¹⁸⁷ *See People v. Volunteers of Am.*, 98 Cal. Rptr. 423, 435 (Cal. Ct. App. 1971); PAUL, *supra* note 23, at 29; Black, *supra* note 79, at 455. Paul also elevates the argument to moral grounds, arguing that property rights outweigh "considerations of efficiency." PAUL, *supra* note 23, at 255; *see Stoebuck, supra* note 6, at 234. Stoebuck explains, "more in accord with basic notions of fairness is the proposition that, if one of two persons must suffer, it should be the one who caused the suffering." Stoebuck, *supra* note 6, at 234.

¹⁸⁸ *See SACKMAN, supra* note 54, at § 8.01[4] at 8-22.

¹⁸⁹ *See id.* § 8.01[4][a] at 8-38.

¹⁹⁰ *See PAUL, supra* note 23, at 29.

application of the condemnation-by-nuisance theory to the airport cases, litigation and compensation in the highway context likely would be scant.¹⁹¹ Arguably, more people live near highways than airports,¹⁹² but not all people living near highways will be able to recover compensation for a taking of their property. Only those property owners who can prove a substantial interference with the use and enjoyment of their property will be able to recover in a claim of inverse condemnation.¹⁹³

C. Traveling the Higher Road: A Final Argument for Application of the Theory of Condemnation-By-Nuisance to the Highway Cases

The state courts that decided *Thornburg v. Port of Portland*¹⁹⁴ and *Martin v. Port of Seattle*,¹⁹⁵ and the courts that followed those decisions,¹⁹⁶ made a significant theoretical leap by doing away with the artificial trespass distinction. The courts recognized that landowners who live near the flight paths of low-flying airplanes were subjected to an equivalent level of damage as those landowners who were compensated for having as little as an airplane's wing-tip pass over their property.¹⁹⁷ In applying a condemnation-by-nuisance theory, these courts expanded the physical concept of a constitutional taking in recognition of the fact that modern nontrespassory activities have the same capacity for interfering with an individual's property interests as actual and direct physical invasions.¹⁹⁸

Ultimately, the debate boils down to an issue of fairness. It is fundamentally unjust that two homes, similarly situated near a highway, are subject to differing standards of compensation merely because one owner had a portion of property condemned—no matter how small—and one did not. Once the partially condemned landowner has been compensated for the portion of land physically taken from him or her, then that landowner becomes identically situated to a

¹⁹¹ See Black, *supra* note 79, at 444.

¹⁹² See *Northcutt v. State Rd. Dep't*, 209 So. 2d 710, 711 (Fla. Dist. Ct. App. 1968), *cert. dismissed*, 219 So. 2d 687 (Fla. 1969).

¹⁹³ See Stoebe, *supra* note 6, at 231–32, 234.

¹⁹⁴ 376 P.2d 100 (Or. 1962).

¹⁹⁵ 391 P.2d 540 (Wash. 1964).

¹⁹⁶ See, e.g., *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 705 P.2d 866 (Cal. 1985), *cert. denied*, 475 U.S. 1017 (1986); *City of Jacksonville v. Schumann*, 167 So. 2d 95 (Fla. Dist. Ct. App. 1964), *cert. denied*, 172 So. 2d 597 (Fla. 1965); *Alevizos v. Metropolitan Airports Comm'n of Minneapolis & St. Paul*, 216 N.W.2d 651 (Minn. 1974); *Henthorn v. City of Oklahoma City*, 453 P.2d 1013 (Okla. 1969).

¹⁹⁷ See Stoebe, *supra* note 6, at 220–21.

¹⁹⁸ See *id.* at 220–21, 236.

neighbor who had no land condemned. Courts, however, distinguish the former as deserving of compensation for the consequential damages of abutting a highway.¹⁹⁹ In light of the realities of damages caused to abutting landowners, this sweeping distinction is arbitrary and indefensible.²⁰⁰ As one court has noted, "although the courts have recognized that the taking or abutting requirements yield incongruous, nonsensical results in many cases the prevailing rules of proximity damages [have been] not the logic of distance but the accident of location of the injury-producing activity."²⁰¹

It is time that courts discard the antiquated physical invasion requirement and adopt a condemnation-by-nuisance approach to inverse condemnation claims of highway abutters.²⁰² To the extent that condemnation-by-nuisance is a matter of law, adoption of such a principle would not mean that our courts would automatically consign themselves to hold for every plaintiff who alleges damages to his or her property from the property's proximity to a newly constructed or widened highway. Before a plaintiff may recover for such alleged damages, the legal principle requires a showing of substantial interference to his or her property.²⁰³ This question of a substantial interference to property, and thus the decisive question of whether or not there has been a taking, is ultimately a question of fact to be decided by a jury.²⁰⁴ Courts must first resolve the underlying question of law by recognizing that such a taking is possible.

¹⁹⁹ See Van Alstyne, *supra* note 4, at 506; *supra* notes 33-53 and accompanying text.

²⁰⁰ See Stoebeck, *supra* note 6, at 236. Stoebeck cogently argues that, "perhaps there was a time when the distinction between trespassory and nuisance-type activities bore some reasonable relation to the capacity for interfering with interests in land. If so, that time is past, and today's law should comport with today's realities." *Id.*

²⁰¹ *Harding v. Department of Transp.*, 205 Cal. Rptr. 561, 565 (Cal. Ct. App. 1984).

²⁰² See Stoebeck, *supra* note 6, at 236.

²⁰³ *Id.* at 231-32.

²⁰⁴ See *Thornburg II*, 415 P.2d 750, 752-53 (Or. 1966). The Oregon Supreme Court detailed the process that should be applied in trials. First the judge can screen the evidence to weed out cases which involve "mere annoyance or interference of a kind that would be objectionable only to the supersensitive." *Id.* at 752. It is then up to the jury to decide if the alleged interference is substantial enough to constitute a taking and, if so, how much compensation is due. *Id.* at 752-53.

The court can tell the jury by way of special instruction in this type of case that there is a difference between negligible, or inconsequential, interferences which all property owners must share and the direct, peculiar, and substantial interferences which result in a loss of market value to the extent that a disinterested observer would characterize the loss as a taking. It is then for the jury to decide from all the evidence upon which side of the line a particular controverted nuisance falls.

Id. at 753.

V. END OF THE ROAD: THE CONCLUSION

Current judicial interpretation of taking law denies compensation to a landowner whose property suffers damages from its proximity to a newly constructed or widened highway if no portion of the property was condemned for a highway project.²⁰⁵ This standard recognizes that a piece of property's proximity to a highway can result in compensable damages but, illogically and unfairly, only where there has been a partial condemnation.²⁰⁶ Courts should look towards the airport cases where a theory of inverse condemnation, predicated on proof that a public use creates a substantial interference with an individual's use and enjoyment of his or her property, has allowed adversely affected landowners to receive compensation for damages attributable to aircraft noise.²⁰⁷ Application of this condemnation-by-nuisance theory by courts in the highway context would provide an overdue remedy for highway abutters.

²⁰⁵ See *supra* notes 53-74 and accompanying text.

²⁰⁶ See *supra* notes 33-53 and accompanying text.

²⁰⁷ See *supra* notes 76-144 and accompanying text.